In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-711

ROGER DUNLAP AND PAUL CUNNINGHAM, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend (1) that the indictment was insufficient to apprise them of the crime charged and to protect them from double jeopardy, and (2) that the circumstantial evidence should not have been viewed in the light most favorable to the government on a motion for judgment of acquittal and on appeal.

After a jury trial in the United States District Court for the Eastern District of Tennessee, petitioners were convicted on five counts of transferring or concealing property in contemplation of bankruptcy (Counts One through Five), in violation of 18 U.S. C. 152,[1] and on

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[1]18 U.S.C. 152 reads in pertinent part:

* * * * *

Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a bankruptcy proceeding by or against him or any other person or corporation, or with intent to defeat the bankruptcy law,

one count of conspiracy to transfer or conceal property in contemplation of bankruptcy (Count Six), in violation of 18 U.S.C. 371.[2] Petitioner Dunlap was sentenced to concurrent six-month terms of imprisonment on Counts One and Six and concurrent two-year terms of imprisonment on Counts Two through Five, the sentences on the latter counts to be served consecutively to the sentences on the former. Execution of the two-year sentences was suspended, but a two-year period of probation was imposed, the probationary period to follow the six-month period of incarceration (Pet. App. H). Petitioner Cunningham was sentenced to six concurrent two-year terms of imprisonment (Pet. App. I).

On November 5, 1974, the court of appeals affirmed petitioners' convictions without opinion (Pet. App. L). The petition for a writ of certiorari was not filed until December 7, 1974, and is thus out of time under Rule 22(2) of the Rules of this Court. There is, in any event, no occasion for further review.

Petitioners purchased Tippens Furniture and Appliance, Inc., in Chattanooga, Tennessee, on April 27, 1973 (Gov't. App. 1b-5b)[3] at a cost of approximately $104,000 (Gov't. App. 4b). The terms of the sales contract

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knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation * * * [s]hall be fined not more than $5,000 or imprisoned not more than five years or both.

[2]The indictment is reprinted in full at Pet. App. A. pp. 17-39.

[3]"Gov't. App." and "Defense App." identify the appendices filed with the court of appeals by the government and the defendants, respectively. Copies of the appendices are being lodged with the Clerk of this Court.

provided that all cash and accounts receivable were to be retained by the seller (Gov't. App. 4b-8b), with petitioners acquiring only the inventory, good will and credit rating of the business.

During May and June of 1973, petitioners accumulated major debts for inventory purchases and factored accounts and failed to meet repayment agreements (Govt. App. 8b-9b, 16b-17b, 20b-21b, 23b). After creditors began to demand immediate payment, but before the filing of a bankruptcy petition by the creditors, petitioners directed the removal and transportation of furniture and appliances on July 18-19, 1973, from Tippens Furniture and Appliance, Inc., as well as from petitioner Cunningham's home, to storage facilities in Pensacola and Tampa, Florida (Gov't. App. 10b, 17b, 21b-22b, 33b-50b). While in Florida, petitioners indicated to Firman Mitchell, one of the truck drivers involved in the transportation of furniture and appliances,[4] that they intended no further business activity on the part of Tippens (Gov't. App. 39b-45b) and offered the truck drivers $500 a load to bring more furniture to Florida (Gov't. App. 42b-43b).

On July 26, 1973, an involuntary bankruptcy petition was filed in the United States District Court by Tippens' creditors (Gov't. App. 24b). By December 13, 1973, $555,212.06 in claims were on file (Gov't. App. 25b-26b).

1. Petitioners contend (Pet. 6-10) that Counts One through Five of the indictment, alleging violations of 18 U.S.C. 152, do not adequately describe the property "transferred or concealed," fail to allege sufficient facts to apprise petitioners of the specific crime charged, and misleadingly state the offense in the disjunctive "trans-

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[4]A complete inventory of the merchandise moved to Florida is reprinted at Defense App. 9-31, 101-132. A partial list was attached to the indictment. See Pet. App. A, pp. 22-39.

fer or conceal." They claim further (Pet. 11) that Count Six fails to allege the time, place and object of the conspiracy agreement.[5]

In *Russell* v. *United States*, 369 U.S. 749, this Court held that an indictment is sufficient if it describes the elements of the offense adequately to apprise the defendant of the charges he must meet and is clear enough to permit the defendant to plead a former conviction or acquittal as a bar to further prosecution. Rule 7(c)(1), Fed. R. Crim. P., requires of an indictment "a plain, concise and definite written statement of the essential facts constituting the offense charged." Those criteria, we submit, are fully satisfied by the indictment in this case.[6]

a. Description of the property.

Petitioners' statement (Pet. 8) that the indictment was insufficient because each count alleged only the concealment of "personal property, to wit: 'household merchandise' or 'other household merchandise'," is incorrect. On the contrary, with the exception of Count

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[5]Although petitioners challenged the indictment in a similar, but not identical fashion, prior to, during and after trial, a motion for a bill of particulars pursuant to Rule 7(f), Fed. R. Crim. P., was not made. Thus, petitioners presumably considered the information contained in the indictment sufficient to prepare a defense to the crime charged.

The district court's opinion rejecting petitioner's attacks upon the indictment is reprinted at Defense App. 72-78.

[6]In *Russell*, the indictment omitted a specific fact crucial to the prosecution of the case. In contrast, petitioners here were informed not only of the times and places of the alleged offenses, the nature of the charge and descriptions of the property involved (to the extent such was within the knowledge of the grand jury), but also of the names of the truck drivers petitioners employed to accomplish the crime.

Four, which identifies "household merchandise, of a value in the amount of $500.00 or more," each count of the indictment identifies specific items or categories of furniture and/or appliances and then states that "a further and more particular description of the property" was unknown to the grand jurors. The items of property, specifically described in Counts One, Two, Three and Five were those that the truck drivers recalled in testimony before the grand jury. While obviously it was impossible for the drivers to recall which property was transported on which trip, the inventory of property transported was attached to the indictment. See Pet. App. A, pp. 22-39. The inability of the grand jurors specifically to identify each piece of property that was transported in each of five trips is not surprising, since the crime charged is one the details of which are peculiarly within the bankrupt's own knowledge, and one "which may be committed under circumstances which render impossible a description of the assets concealed." *Beitel* v. *United States,* 306 F. 2d 665, 668 (C.A. 5), quoting *Kanner* v. *United States,* 21 F. 2d 285, 287 (C.A. 2); 2A Collier *On Bankruptcy,* 29.05 [3.3]. (14th ed., 1974).[7]

Since each count of the indictment identifies its subject by date, destination, name of truck driver, and—to the extent possible—property descriptions, petitioners were apprised of sufficient facts concerning the offense charged to prepare their defense. Moreover, the indictment was sufficiently specific to bar further prosecution for the same offense after conviction or acquittal.

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[7] Petitioners' reliance upon *United States* v. *Arge,* 418 F. 2d 721 (C.A. 10), and *Van Liew* v. *United States,* 321 F.2d 664 (C.A. 5), is misplaced. In *Arge,* the court of appeals reversed a district court's dismissal of an indictment and stated that an indictment for concealment of assets must describe the assets. The indictment in petitioners' case does describe the property concealed. In *Van Liew,* the indictment failed to allege specific types of economic adulteration of food products, thus requiring speculation as to which of twelve types was alleged. The indictment in petitioners' case requires no such speculation to determine the offense charged.

b. *Sufficiency of the facts pleaded.*

Each substantive count of the indictment alleges that petitioners, "in contemplation of the filing of bankruptcy proceedings * * * knowingly and fraudulently and with intent to defeat the bankruptcy law did transfer[8] or conceal property of the Bankrupt * * *" by shipping it from Chattanooga to Florida (Pet. App. A, pp. 17-20). Each count included the date of the alleged shipment, the point to which it was transferred, the name of the driver on that occasion, the mode of transportation, and, as noted, a sufficiently specific description of the property. Those allegations were sufficient to apprise petitioners of the offense charged and to protect them from double jeopardy. *Russell* v. *United States, supra;* see also *Gaither* v. *United States,* 413 F.2d 1061, 1066 (C.A. D.C.).

c. Disjunctive pleading.

The essence of the crime charged is the disposition of assets in such a manner that they will not be brought within the knowledge and control of the bankruptcy authority designated to protect the rights of creditors. The statute, 18 U.S.C. 152, uses the disjunctive to describe the alternative means (transfer or conceal) of committing the same statutory offense. Thus, only one crime was charged in each count of the indictment, and the disjunctive pleading—"transfer or concealment"—could not have misled petitioners to their prejudice. Indeed, we fail to see how petitioners were prejudiced in the slightest, for even if the allegations in the indictment were phrased in the conjunctive—as petitioners suggest they should have been (Pet. 9)—it would be sufficient for the government to prove

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[8]Petitioners' claim of confusion (Pet. 10) over the relationship between the phrase in the indictment "such transfer * * * being carried out by a truck" and the statutory term "transfer or conceal" is difficult to understand. It seems clear that the grand jury, in using the former phrase, simply added particularity and factual substantiation to the alleged offense.

any one of the acts alleged. See *Turner* v. *United States*, 396 U.S. 398, 420; *Crain* v. *United States*, 162 U.S. 625, 636; *Wolpa* v. *United States*, 86 F. 2d 35, 39 (C.A. 8). In that case, as in this, petitioners would be on notice that they should be prepared to defend against any one of the acts charged.

d. Sufficiency of the conspiracy count.

There is no merit to petitioners' contention (Pet. 11) that Count Six of the indictment, alleging a conspiracy in violation of 18 U.S.C. 371, is insufficient in its allegations of time, place, agreement between the conspirators, and object of the conspiracy. Count Six alleges the time ("on or about July 20, 1973, and through and including July 27, 1973"), the place ("in the Eastern District of Tennessee and elsewhere"), the agreement ("did willfully and knowingly combine, conspire, confederate and agree together with each other"), and the object of the conspiracy ("in contemplation of the filing of bankruptcy proceedings against the Bankrupt, and with intent to defeat the bankruptcy law, did [conspire to] transfer or conceal property of the Bankrupt, that is, certain electrical appliances and other household goods * * * ") (Pet. App. A, p. 20). The allegations in the charging paragraphs are followed by seven overt acts "[i]n furtherance of the conspiracy and to effect the object thereof" (Pet. App. A, pp. 20-21). Thus, the conspiracy count is clearly sufficient to have apprised petitioners of the time, place, agreement and object of the conspiracy.[9]

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[9]As for petitioner's statement (Pet. 11) that "an indictment for conspiracy must clearly show that the act agreed to be done embraced all of the elements essential to constitute an offense," it is sufficient to reiterate this Court's statement in *Wong Tai* v. *United States*, 273 U.S. 77, 81, that "it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy."

2. Petitioners' claim (Pet. 12-14)—that because the evidence against them was largely circumstantial the courts below should not have viewed the evidence in the light most favorable to the government upon motions for judgment of acquittal and on direct appeal—borders on the frivolous. It is hornbook law that no greater degree of certainty is required of circumstantial evidence than of direct evidence[10] and that the courts are to view the evidence in the light most favorable to the government both on a motion for judgment of acquittal and on appeal.[11]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[10] *E.g., Holland* v. *United States*, 348 U.S. 121, 139-140; *United States* v. *Morgan*, 469 F. 2d 83, 84 (C.A. 6); *United States* v. *Prieur*, 429 F.2d 1237, 1238 (C.A. 6); *Hunt* v. *United States*, 316 F. 2d 652, 654 (C.A. D.C.).

[11] *E.g., Glasser* v. *United States*, 315 U.S. 60, 80; *United States* v. *Lewin*, 467 F. 2d 1132, 1141 (C.A. 7); *United States* v. *Harris*, 435 F. 2d 74, 88 (C.A. D.C.), certiorari denied, 402 U.S. 986; *United States* v. *Williams*, 311 F. 2d 721 (C.A. 7), certiorari denied, 374 U.S. 812.

Bartkus v. *United States*, 21 F. 2d 425 (C.A. 7), upon which petitioners rely (Pet. 14), is not authority for a contrary principle of law. The decision in that case rested on the particular facts before the court. In any event, *Bartkus* was decided fifteen years before this Court's decision in *Glasser*, in which it was said (315 U.S. at 80):

> It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. * * * Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a "development and a collocation of circumstances." [Citation omitted.]